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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

THE RIVER FLOWED THROUGH FISCHER CUT AT INTERMEDIATE AS WELL AS AT HIGHER STAGES OF THE RIVER

Defendant corporation incorrectly states the Facts Concerning Fischer Cut. At page 4 of respondent's answering brief, it states:

"As shown by the profile at the bottom of Exhibit

62 water flowed through this Chute *only when it reached a level of five feet above normal high water.*"

Defendant's interpretation that water flowed in the overflow channel only when the river was five feet above normal *high* water is not supported by the record.

The uncontradicted testimony was to the contrary in that the flowing of water at the five foot stage meant 5 feet above *the lowest stage of the river.* Thus at page 225 of the Transcript the following appears:

"Q: Well, to simplify that a little bit, Mr. McReary, would water flow in that chute?

"A: Yes, it would flow in that chute any time that *the water stage of the river above the lowest stage observed at that time,* whenever that stage reached, according to the scale here, reached five feet above extreme — *above the lowest stage of the river,* water would enter that chute and course downriver. It would be — it might be stopped a few feet downriver and have to rise a foot higher than that in order to get over the point that's indicated in the channel downstream from its entrance at 'B.'

"Q: Is five feet above extreme low water a high water stage or intermediate stage?

"A: *It is an intermediate stage, a typical summer-spring-fall stage,* when it drops below five feet, that would be getting closer toward the lowest water. This map, the legend indicates it's drawn with all the information being based on the lowest water and it contains soundings in the channel so that the depth

of the channel is known at lowest water." (emphasis supplied)

The court itself found that "[t]he Fischer Cut Channel was dry at low water, or below the five foot stage, and carried water only at "*intermediate* or high stages of the river." (emphasis supplied) (A 181). Even this state of facts had changed by January of 1906. The court found that one-fourth the river was flowing through Fischer Cut (A-181). This flow was at only the four foot stage (Ex 110A, p. 2; A-103-104).

Nor, as defendant incorrectly contends, was the flow through Fischer Cut confined only to the winter months. Water flowed in the cut also in the spring and fall. During spring, the whole island (Fischer Island) was sometimes covered with extreme high water (Tr 394, A-48). For example, in April of 1907, at the Albany Guage, the river was frequently above the four foot stage as Exhibit 71, page 162 attests (A-76). Similarly, Exhibit 71, page 73 shows that in November of 1906 the Albany Guage was frequently and substantially above the four foot stage (Appendix to this brief p. 10).*

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* This page of Exhibit 71 is part of the admitted evidence but was not included in the joint Appendix of the parties and, therefore, is included as an appendix to this brief.

II.

THE FACTUAL INFERENCE OR LEGAL CONCLUSION OF THE OREGON COURTS THAT AN AVULSION OCCURRED AT FISCHER CUT IS NOT BINDING UPON THE UNITED STATES SUPREME COURT IN THIS CASE.

Defendant argues (Resp Ans Br, p. 9) that the trial court's finding of an avulsion is binding on this Court. Except for the errors noted herein in defendant's statement of the facts, the facts as set out in petitioner's (the State's) brief are undisputed. The question arises whether those facts support (1) an inference that what occurred at Fischer Cut, i.e., the major portion of the river moving through Fischer Cut, was sudden, and (2) even if it was sudden, the conclusion that it was an avulsion.

The process of erosion and enlargement of Fischer Cut occurred over a 20-year period and is described in detail commencing at page 5 of petitioner's brief in Case No. 75-567. No one knows how much river was flowing through the cut just before the flood of November 25, 1909 (this flood was one of the many that had occurred in the area; see pp. 5 and 7 of petitioner's brief). All

anyone knew was that in January of 1906, one-fourth of the river flowed through the cut. (Ex 110A, p. 1; A-103, Tr 231, 225). The trial court so found (A-181). This flow was at only the four foot stage (Ex 110A, p. 2, A-104, Tr 231, 225). After January of 1906 and two intervening floods, the last of which was on November 25, 1909, it was discovered that the main body of the river flowed over Fischer Cut. After 20 years of erosive floods, the factual inference of avulsion drawn by the trial court from this series of facts is open to serious question. As a *legal* matter, since two channels were already in existence, the conclusion of an avulsion is unsupportable.

In any event, the *factual* inference or *legal* conclusion of an avulsion in an essentially agreed upon factual setting are clearly not binding on this court where the state is asserting title under the Equal Footing Doctrine to the riverbed underlying Fischer Cut. *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 771 (1945). *First National Bank of Hartford v. City of Hartford,* 273 U.S. 548, 552-553 (1927); *Great Northern Railroad Co. v. State of Washington*, 300 U.S. 154, 165-166 (1937); *Whitus v. State of Georgia,* 385 U.S. 545, 550 (1967).

For the reasons advanced at pages 20-27 of petitioner's (State's) brief in Case No. 75-567, and at pages 19-25 of respondent's (State's) brief in Case No. 75-577, the Court should not accept or follow the state court conclusion.

Respectfully submitted,

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APPENDIX

Albany, Oreg.

1905	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	16.8	5.8	4.0	7.4	2.7	3.0	1.8	0.8	0.5	1.0	1.7	4.0
2	11.8	5.7	4.0	7.2	2.5	3.0	1.7	0.8	0.5	1.0	4.5	4.4
3	9.4	5.7	3.7	7.0	2.6	3.0	1.6	0.8	0.5	1.0	1.5	4.8
4	8.0	5.6	3.5	6.8	2.6	3.3	1.6	0.8	0.5	1.0	1.4	5.0
5	7.6	5.2	3.9	6.7	2.5	3.5	1.6	0.8	0.5	1.0	1.3	5.0
6	6.8	4.8	3.3	6.6	2.3	3.6	1.6	0.8	0.5	1.0	1.3	4.8
7	6.3	4.5	3.1	6.4	2.3	4.0	1.5	0.7	0.5	1.3	1.3	4.6
8	5.7	4.0	2.9	6.0	2.3	3.9	1.5	0.7	0.5	2.0	1.3	4.6
9	5.3	4.0	2.9	5.5	2.4	3.8	1.4	0.7	0.5	3.2	1.2	4.6
10	4.8	3.8	2.9	5.1	4.0	3.4	1.4	0.7	0.5	2.6	1.2	4.3
11	4.5	3.6	2.9	4.8	4.5	3.2	1.2	0.7	0.5	2.2	1.1	4.0
12	4.0	3.4	2.8	4.5	4.4	3.0	1.2	0.7	0.5	1.8	1.1	3.0
13	3.8	3.1	2.6	4.1	4.6	2.8	1.2	0.7	0.5	1.5	1.0	3.2
14	3.9	3.0	2.6	4.0	4.4	2.6	1.2	0.7	0.5	1.5	1.0	3.0
15	4.2	2.9	2.4	4.0	4.2	2.6	1.3	0.7	0.5	2.3	1.0	3.0
16	5.5	2.9	2.4	3.9	4.0	2.5	1.3	0.7	0.5	2.3	1.0	2.8
17	5.7	2.9	2.6	3.9	3.8	2.2	1.3	0.7	0.5	2.3	1.0	2.8
18	5.1	3.0	2.5	3.7	3.6	2.1	1.4	0.7	0.5	2.3	1.0	3.0
19	5.0	3.2	2.6	3.6	3.4	2.0	1.4	0.7	0.5	2.3	1.2	3.3
20	5.0	3.6	2.8	3.6	3.2	1.9	1.4	0.7	0.5	2.3	1.7	4.0
21	4.8	3.9	3.7	3.6	3.2	1.8	1.5	0.7	0.5	2.0	3.0	5.0
22	5.0	4.1	6.8	3.5	3.3	1.8	1.2	0.7	0.5	1.9	2.8	5.4
23	5.8	4.3	7.5	3.2	3.5	1.8	1.0	0.7	0.5	1.8	2.5	4.8
24	7.8	5.2	7.4	3.0	4.0	1.8	0.8	0.7	0.5	1.6	2.0	4.4
25	8.9	5.0	8.4	3.1	4.1	1.8	0.8	0.6	0.5	1.6	2.3	4.2
26	8.8	4.8	10.0	3.1	3.8	1.8	0.8	0.5	0.7	1.6	2.6	4.0
27	8.5	4.5	13.0	3.1	3.6	2.0	0.8	0.5	0.8	2.8	2.8	5.6
28	7.8	4.2	12.9	3.0	3.5	2.0	0.8	0.5	0.9	2.8	3.0	6.8
29	7.2	.....	11.0	2.9	3.4	2.0	0.8	0.5	1.0	2.6	3.0	5.4
30	6.7	.....	9.5	2.8	3.2	2.0	0.8	0.5	1.0	2.0	3.5	6.0
31	6.8	.....	8.0	.....	3.0	.....	0.8	0.5	.....	2.0	.....	6.8
Means	6.7	4.2	5.1	4.5	3.4	2.6	1.2	0.7	0.6	1.9	1.7	4.4

Albany, Oreg.

1906	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	7.4	5.8	11.4	6.2	4.8	6.6	3.0	1.4	0.8	0.7	1.2	3.5
2	7.0	5.8	9.8	7.0	4.4	5.6	2.8	1.3	0.8	0.7	1.6	3.2
3	6.2	5.5	8.4	6.2	4.4	5.1	2.6	1.3	0.8	0.6	1.4	3.0
4	5.4	5.3	7.6	5.7	4.0	4.8	2.6	1.2	0.8	0.7	1.2	2.8
5	5.0	5.2	7.0	5.3	4.0	5.3	2.6	1.2	0.8	0.7	1.4	2.8
6	5.0	5.0	6.7	5.0	4.0	5.0	2.6	1.2	0.8	0.9	1.6	2.7
7	5.0	4.8	6.5	4.8	4.0	5.2	2.5	1.2	0.7	0.9	2.0	3.3
8	5.0	4.4	6.5	4.9	3.6	5.8	2.5	1.2	0.7	0.8	4.2	5.8
9	5.4	4.0	6.2	4.5	3.5	5.6	2.5	1.1	0.7	0.7	8.7	5.3
10	6.8	4.0	6.0	4.8	3.5	5.8	2.0	1.1	0.7	0.7	6.4	5.6
11	6.8	3.8	6.0	4.5	3.5	6.0	2.2	1.0	0.7	0.7	5.8	6.0
12	6.8	3.8	6.0	4.3	3.5	5.6	2.0	1.0	0.7	0.7	6.0	6.1
13	7.6	3.6	5.4	4.0	3.4	5.4	1.9	0.9	0.8	0.7	5.0	5.5
14	9.0	3.2	5.0	3.8	3.4	5.0	1.8	0.9	1.7	0.8	7.0	5.0
15	9.0	3.2	4.8	3.7	3.2	4.9	1.8	0.9	1.3	0.9	9.1	4.6
16	8.9	4.0	4.4	3.6	4.0	4.9	1.7	0.9	1.8	1.1	10.9	5.1
17	11.0	4.0	4.0	3.6	4.2	6.0	1.7	0.8	1.8	1.5	12.3	5.5
18	14.2	4.2	4.0	3.6	3.8	6.0	1.7	0.8	1.5	3.0	11.4	6.2
19	12.6	5.0	3.8	3.5	3.6	5.4	1.6	0.8	1.0	3.0	12.1	5.9
20	10.4	8.2	3.8	3.5	3.6	4.8	1.6	0.8	0.9	2.6	9.8	7.0
21	8.8	10.0	4.2	3.5	3.4	4.4	1.6	0.8	0.9	2.4	8.0	10.0
22	7.6	12.4	4.8	3.8	3.8	4.0	1.6	0.8	0.3	2.0	8.0	10.0
23	6.8	11.8	4.8	3.8	4.1	3.8	1.5	0.8	0.8	1.8	7.7	8.5
24	7.6	11.8	4.8	3.8	4.4	3.6	1.5	0.8	0.7	1.6	6.7	7.9
25	9.7	13.8	4.8	3.9	4.2	3.5	1.5	0.8	0.8	1.4	5.9	7.6
26	9.2	14.6	4.8	3.9	4.1	3.0	1.5	0.8	0.9	1.3	5.2	9.1
27	9.0	13.0	4.8	4.4	4.0	3.0	1.5	0.9	0.8	1.2	4.8	9.5
28	8.6	12.8	4.8	4.4	4.0	3.0	1.4	1.0	0.8	1.4	4.4	9.6
29	7.0	.....	4.4	4.9	4.4	3.0	1.4	1.0	0.7	1.5	4.0	8.0
30	6.5	.....	4.2	4.9	8.8	3.0	1.4	0.8	0.7	1.4	3.8	8.0
31	6.2	.....	4.4	.....	7.6	.....	1.4	0.8	.....	1.3	.....	7.2
Means	7.8	6.9	5.6	4.5	4.2	4.8	1.9	1.0	0.9	1.3	5.9	6.1